

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
OCTOBER 9, 2002

DALE PRATT V. AVERITT EXPRESS, INC.

**Direct Appeal from the Chancery Court of Knox County
No. 150624-2 Daryl Fansler, Chancellor**

Filed February 14, 2003

No. E2002-00864-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employer appeals the trial court's refusal to cap the employee's award at two and one-half times the employee's medical impairment as provided by Tenn. Code Ann. § 50-6-241(a)(1). We modify the judgment of the trial court.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the Knox County Chancery Court is Modified.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

Andrew R. Tillman, LLP, Paine, Tarwater, Bickers and Tillman, Knoxville, Tennessee, for the Appellant, Averitt Express, Inc.

Richard Baker, Baker, Gulley & Oldham, P.A., Knoxville, Tennessee, for the Appellee, Dale Pratt.

MEMORANDUM OPINION

Facts

On October 27, 1999, Dale Pratt sustained a back injury in the course and scope of his employment with Averitt Express, Inc. ("Averitt"). His treating physician assigned a permanent medical impairment of seven percent to the body as a whole. At the time of the injury, Pratt was working as a truck driver and was paid \$17.10 per hour for both regular and overtime hours he

worked. Following the injury, medical restrictions prevented his return to work as a truck driver. Averitt trained him to be a dispatcher and retained him at a salary of \$725 for a 40-hour week, the equivalent of \$18.12 per hour and paid him overtime at the rate of \$9.06 per hour. Mr. Pratt continued to work approximately the same amount of overtime as he had worked before the injury. Pay records introduced at the trial established that because of the difference in overtime pay per hour, the actual average weekly compensation received by Mr. Pratt before the injury was greater than that received after he returned to work in the new position. The trial court held that Mr. Pratt had “not returned to the same wage because he was earning less on an average weekly basis than he did prior to the injury; that the two and a half times under 241 (did) not apply; and that he is entitled to a permanent and partial disability to the body as a whole at three and half times seven percent for a rating twenty-four and half percent to the body as a whole in this case.”

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise Tenn. Code Ann. § 50-6-225(e)(2); *Tucker v. Foamex, L.P.*, 31 S.W.3d 241, 242 (Tenn. 2000). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers’ compensation cases. *Corcoran v. Foster Auto GMC, Inc.*, 746 S.W.2d 452 456 (Tenn. 1988). Conclusions of law are subject to *de novo* review with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293 (Tenn. 1997).

Issue

The issue is whether the trial court erred in failing to apply the statutory cap of two and one-half times the employee’s medical impairment pursuant to Tenn. Code Ann. § 50-6-241(a)(1).

Discussion

At the time of the trial of this case, the Tennessee Supreme Court had decided the case of *Wilkins v. Kellogg Co.*, 48 S.W.3d 148 (Tenn. 2001) relating to an award of temporary partial disability and holding that the term “wage” as used in Tenn. Code Ann. § 50-6-207(2) referred to the amount paid to an injured employee by an employer on an hourly basis. The Supreme Court, with two members dissenting, distinguished the term “wage” as used in Tenn. Code Ann. § 50-6-207(2) from the term “average weekly wage” used in other portions of the Worker’s Compensation Act. In *Wilkins*, the Court noted that “average weekly wage” includes such compensation as overtime, bonuses and commissions. It held that the term “wage” as used in Tenn. Code Ann. § 50-6-207(2) did not permit the inclusion of overtime in determining the amount of temporary partial benefits to be paid to an injured employee. Ms. Wilkins normally worked 60 hours each week and was paid at the rate of \$21.52 per hour for 40 hours and a higher

rate for overtime. Because the employer paid Ms. Wilkins the same hourly rate for 40 hours of work each week after she returned to work on light duty, she was not entitled to an increase in temporary partial disability benefits even though her weekly earnings were substantially reduced. The Supreme Court emphasized that it was not deciding “whether the term ‘wage’ takes into account an employee’s non-wage income if that employee is regularly compensated by non-wage income.”

On July 12, 2002, after trial of the present case, the Supreme Court decided *Powell v. Blalock Plumbing and Elec.*, 78 S.W.3d 893 (Tenn. 2002). That case presented two issues: (1) the meaning of the term “wage” as used in Section 241(a)(1); and (2) whether the employee made a meaningful return to work. As pertinent to this case, the Court held that “the term “wage” in Tenn. Code Ann. § 50-6-241(a)(1) means the hourly rate of pay for an employee who is compensated on an hourly basis.” *Powell*, 78 S.W.3d at 898. The Supreme Court acknowledged that the term “wage” is not defined in the Worker’s Compensation Act and a majority of the Court elected to follow the definition adopted in *Wilkins*.

In two recent decisions, the Supreme Court has differentiated the terms “average weekly wage” and “wage” as used in the Worker’s Compensation Act. It has construed the term “wage” to refer to hourly compensation for an employee paid by the hour without regard to any other compensation received by the employee such as overtime. In the present case, the trial court found that Mr. Pratt was paid \$17.10 per hour before the injury and \$18.12 per hour when he returned to work after the injury. His “wage” following the injury is, therefore, greater than the “wage” he was receiving at the time of injury. (There was no contention that Mr. Pratt did not make a meaningful return to work.) Applying the cap imposed by Tenn. Code Ann. § 50-6-241(a)(1), we find that the award should be modified to 17.5 percent to the body as a whole (two and one-half times the seven percent medical impairment).

Disposition

The judgment of the trial court is modified to award permanent partial disability benefits for 17.5 percent to the body and a whole, and the case is remanded to the trial court for any further proceedings. Costs of the appeal are taxed against the Appellee.

Howell N. Peoples, Special Judge

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AT KNOXVILLE, TENNESSEE

DALE PRATT V. AVERITT EXPRESS, INC.
Knox County Chancery Court
No. 150624-2

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

The costs on appeal are taxed to the appellee, Dale Pratt, for which execution may issue if necessary.